Lee Ah Mok & Ors v Pentadbir Tanah Daerah Seremban & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-01–78 OF 2008
SURIYADI, ABU SAMAH AND AHMAD MAAROP JJCA
28 OCTOBER 2008

Civil Procedure — Striking out — Action, land reference — Application to strike out or dismiss — Order in terms, appeal against — Difference in procedural effect of dismissal order and order to strike out action — Whether confusion was sufficient ground to allow appeal — Whether land reference proceedings under Part V of the Land Acquisition Act 1960 must take place in open court — Land Acquisition Act 1960 ss 37, 45, Part V

Land Law — Acquisition of land — Award — Objection against — Application by intervener on grounds that appellants precluded under s 37(1) of the Land Acquisition Act 1960 from objecting to award — Whether objection was filed out of time — Whether erroneous and against weight of evidence — Land Acquisition Act 1960 ss 37, 38, 45, Part V

The appellants were the registered owners of part of an undivided piece of land in Seremban, which was acquired by the first respondent under the Land Acquisition Act 1960 ('the Act'). The appellants were dissatisfied with the amount of compensation awarded to them ('the award') by the first respondent upon acquisition of the land and therefore lodged their objection to the award by filing the requisite Form N under s 38(1) of the Act, on 17 January 1995. Unfortunately, due to the first respondent's oversight and inaction the objection was left unattended and never processed. When the matter came to light the appellants were already out of time to re-file their objection and had to apply to court for an extension of time to re-file their objection. On 15 June 2001 the appellants obtained a consent order for an extension of time to file their objection to the award. Accordingly, on 12 July 2001 the appellants again lodged their objection to the award by submitting nine fresh copies of Form N together with the requisite deposit payment. The first respondent duly referred the objection to the court for its determination. Some time in September 2004 the appellants and the first respondent came to a consensus that additional compensation of RM5,000 per acre would be paid to the respective appellants by the first respondent and that the additional compensation would be effective from June 2001. In the

meantime the second respondent successfully applied to intervene in the land reference as an interested party on the grounds that it was the party who had paid the award for the acquired land. Once the second respondent became an intervener it applied under O 92 r 4 of the Rules of the High Court 1980 ('the RHC') to dismiss or strike out the land reference. In this summons in chambers application, the second respondent contended that since the appellants had received their compensation without protest they were precluded under s 37(1) of the Act from objecting to the compensation awarded to them and that their challenge against the award was extinguished. This was because s 37(1) only allows any interested person who accepted the award under protest to object. The second respondent relied on receipts of acknowledgment of the award ('Forms H') as evidence that the appellants had received the compensation without protest. In reply the appellants denied any knowledge of the second respondent or of the fact that the award was paid by the latter. They also pointed out that the payments were made by the first respondent by cheques issued by the state's corporate arm and that these did not in any way reveal the existence of the second respondent. The appellants further submitted that they had never received the Forms H much less signed them and that even if they had signed them it should not be construed as taking away their right to refer their objection to the court or that they were satisfied with the award. The court held that Form N was not filed within the time stipulated and accordingly granted the second respondent's application to dismiss or strike out the appellants' land reference. This was the appellants' appeal against that decision.

Held, allowing the appeal with costs:

(1) (per **Suriyadi JCA** and **Abu Samah JCA**) The decision of the court merely stated an 'order in terms' without clarifying whether the land reference was dismissed or struck out. In effect the two orders, ie an order of dismissal and an order to strike out are very different. In the event of any dissatisfaction the procedure to be adhered to pursuant to a dismissal order is to file an appeal and in the case of a striking out order to file for a reinstatement application. That confusion in itself was sufficient ground to allow the appeal or set aside the order. Further, if the order was a dismissal of the land reference it would mean that the proceedings were adjudged not in accordance with the special provisions of the Act but pursuant to the RHC. As the present land reference under s 37 of the Act falls under Part V of the Act there is a mandatory provision under s 45 of the Act, which requires every land reference proceeding under Part V to take place in open court. However, the order of the judge in the present application was meted down in chambers and not in open court as statutorily required. As

such, regardless of whether it was a dismissal or striking out order, it was tainted and thus ought to be set aside (see paras 11–12).

(2) (per **Abu Samah JCA**) The conclusion by the court that the appellants' objection in Form N was filed out of time was erroneous and against the weight of evidence. The nine fresh copies of Form N together with the requisite deposit were duly received and acknowledged by the first respondent on 13 July 2001 and that was well within the 30 day period granted by the court. As such this was an obvious case for appellate intervention to rectify an error in a finding of fact (see para 34).

(3) (per **Abu Samah JCA** and **Suriyadi JCA**) The non-signing of practically all the Forms H, which were supplied by the second respondent, was also sufficient notification of their protests. Even if this interpretation was not accepted, there was ample evidence before the court to support the appellants' contention that they accepted the award under protest. The appellants had filed the necessary objections by way of the Form N as far back as 17 January 1995 but these were never processed by the first respondent. The appellants should not be made to suffer for the negligence of the land office. Thus to say that the appellants never objected to the award was an erroneous factual finding (see paras 16 & 31).

(4) (per **Abu Samah JCA**) The second respondent's contention that the appellants accepted the compensation without protest by relying upon Form H was misconceived and untenable. Form H, as it then was, did not contain any stipulation that an interested person must state whether he accepted the compensation under protest or otherwise. This Form H was only subsequently amended and replaced by a new Form H which came into force on 1 March 1998. It was only in the new Form H that any interested person was required to state whether or not he accepted the compensation under protest. However, Form H in the present case was issued on 30 July 1997. In any case, the appellants maintained that they had not signed Forms H and their stand remained unrebutted as the first respondent did not file any affidavit to state to the contrary (see paras 35–37).

(5) (per **Suriyadi JCA**) The first respondent's subsequent decision to increase the compensation sum by RM5,000 per acre was prima facie evidence of the existence of some dissatisfaction, leading to a reasonable cause of action. As such it should not be struck out (see para 18).

[Bahasa Malaysia summary

Perayu-perayu merupakan pemilik-pemilik berdaftar sebahagian daripada sebidang tanah yang tidak dibahagikan di Seremban yang diperolehi

responden pertama di bawah Akta Pengambilan Tanah 1960 ('Akta tersebut'). Perayu-perayu berasa tidak puas hati dengan jumlah pampasan yang telah diawardkan kepada mereka ('award tersebut') oleh responden pertama apabila memperoleh tanah tersebut dan oleh itu mengemukakan bantahan mereka terhadap award tersebut dengan memfailkan Borang N yang ditetapkan di bawah s 38(1) Akta, pada 17 Januari 1995. Malangnya, akibat daripada kesilapan dan tiada tindakan oleh responden pertama bantahan itu tidak diberikan perhatian dan tidak diproses. Apabila perkara ini disedari perayu-perayu telahpun di luar had masa untuk memfailkan semula bantahan mereka dan terpaksa memohon kepada mahkamah untuk lanjutan masa bagi memfailkan semula bantahan mereka. Pada 15 Jun 2001 perayu-perayu telah memperoleh perintah persetujuan untuk lanjutan masa untuk memfailkan bantahan terhadap award tersebut. Oleh sebab itu, pada 12 Julai 2001 perayu-perayu sekali lagi telah mengemukakan bantahan mereka terhadap award tersebut dengan mengemukakan sembilan salinan baru Borang N bersama dengan bayaran deposit yang ditetapkan. Sekitar bulan September 2004 perayu-perayu dan responden pertama mencapai persetujuan bahawa pampasan tambahan RM5,000 seekar akan dibayar kepada perayu-perayu masing-masingnya oleh responden pertama dan bahawa pampasan tambahan itu akan berkuat kuasa dari bulan Jun 2001. Sementara itu responden kedua telah berjaya memohon untuk mencelah dalam rujukan tanah sebagai pihak yang berkepentingan atas alasan-alasan bahawa ia merupakan pihak yang telah membayar award tersebut untuk tanah yang diperoleh. Setelah responden kedua menjadi pencelah ia memohon di bawah A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk menolak atau membatalkan rujukan tanah tersebut. Dalam permohonan saman dalam kamar ini, responden kedua menegaskan bahawa memandangkan perayu-perayu telah menerima pampasan mereka tanpa bantahan mereka dihalang di bawah s 37(1) Akta tersebut daripada membantah terhadap pampasan yang telah diawardkan kepada mereka dan bahawa cabaran mereka terhadap award tersebut telah lenyap. Ini adalah kerana s 37(1) hanya membenarkan mana-mana orang berkepentingan yang menerima award tersebut dengan bantahan untuk membantah. Responden kedua telah bergantung kepada resit-resit penerimaan award tersebut ('Borang-Borang H') sebagai keterangan bahawa perayu-perayu telah menerima pampasan tersebut tanpa bantahan. Sebagai jawapan perayu-perayu menafikan responden kedua mempunyai apa-apa pengetahuan atau fakta bahawa award tersebut telah dibayar oleh responden kedua. Mereka juga mengutarakan tentang bayaran-bayaran yang telah dibuat oleh responden pertama melalui cek-cek yang dikeluarkan oleh pihak korporat negeri dan bahawa ia tidak dalam apa carapun menunjukkan tentang kewujudan responden kedua. Perayu-perayu selanjutnya telah menghujahkan bahawa mereka tidak pernah menerima Borang-Borang H tersebut dan juga tidak menandatanganinya dan bahawa jikapun mereka telah menandatanganinya ia tidak patut ditafsirkan sebagai merampas hak mereka untuk merujuk bantahan mereka ke

mahkamah atau bahawa mereka telah berpuas hati dengan award tersebut. Mahkamah ini memutuskan bahawa Borang N tidak difailkan dalam tempoh masa yang ditetapkan dan oleh sebab itu telah membenarkan permohonan responden kedua untuk menolak atau membatalkan rujukan tanah perayu-perayu. Ini adalah rayuan perayu-perayu terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) (oleh **Suriyadi HMR** dan **Abu Samah HMR**) Keputusan mahkamah hanya menyatakan '*order in terms*' tanpa menjelaskan sama ada rujukan tanah itu telah ditolak atau dibatalkan. Dari segi kesan dua perintah itu, iaitu perintah pengetepian dan perintah pembatalan adalah amat berbeza. Sekiranya terdapat apa-apa ketidakpuasan prosedur yang perlu dipatuhi berikutan perintah pengetepian adalah untuk memfailkan rayuan dan dalam kes perintah pembatalan untuk memfailkan permohonan pengembalian. Kekeliruan itu sendiri merupakan alasan mencukupi untuk membenarkan rayuan atau perintah pengetepian. Tambahan pula, jika perintah itu merupakan pengetepian rujukan tanah maka ia bermaksud bahawa prosiding telah diputuskan tidak menurut peruntukan khas Akta tersebut tetapi menurut KMT. Memandangkan rujukan tanah di bawah s 37 Akta tersebut terangkum di bawah Bahagian V Akta tersebut terdapat peruntukan mandatori di bawah s 45 Akta, yang memerlukan setiap prosiding rujukan tanah di bawah Bahagian V dijalankan di mahkamah terbuka. Walau bagaimanapun, perintah hakim dalam permohonan ini telah diberikan dalam kamar dan bukan di mahkamah terbuka sepertimana yang dikehendaki statut. Oleh itu, meskipun sama ada ianya pengetepian atau pembatalan, ia telah tercemar dan dengan itu patut diketepikan (lihat perenggan 11–12).

(2) (oleh **Abu Samah HMR**) Kesimpulan oleh mahkamah bahawa bantahan perayu-perayu dalam Borang N telah difailkan di luar tempoh masa adalah salah dan bertentangan dengan beban keterangan. Sembilan salinan baru Borang N bersama dengan deposit yang ditetapkan telahpun diterima dan diakui oleh responden pertama pada 13 Julai 2001 dan adalah dalam tempoh masa 30 hari yang diberikan oleh mahkamah. Oleh demikian ini jelas kes untuk campur tangan mahkamah rayuan untuk memperbetulkan kesilapan dalam penemuan fakta (lihat perenggan 34).

(3) (oleh **Abu Samah HMR** dan **Suriyadi HMR**) Borang-Borang H yang kesemuanya dikatakan tidak ditandatangani, yang diberikan oleh responden kedua, juga pemberitahuan yang mencukupi tentang bantahan-bantahan mereka. Jikapun pentafsiran ini tidak diterima, terdapat keterangan yang mencukupi di hadapan mahkamah untuk

menyokong hujah perayu-perayu bahawa mereka telah menerima award tersebut tanpa bantahan. Perayu-perayu telah memfailkan bantahan-bantahan yang patut melalui Borang N bermula 17 Januari 1995 tetapi yang berikut tidak pernah diproses oleh responden pertama. Perayu-perayu tidak patut terjejas kerana kecuaian pejabat tanah. Oleh itu untuk mengatakan perayu-perayu tidak membantah award tersebut adalah penemuan fakta yang silap (lihat perenggan 16 & 31).

(4) (oleh **Abu Samah HMR**) Hujah responden kedua bahawa perayu-perayu telah menerima pampasan tanpa bantahan dengan bergantung kepada Borang H telah disalah tanggap dan tidak dapat dipertahankan. Borang H, pada ketika itu, tidak mengandungi apa-apa syarat bahawa orang berkepentingan perlu menyatakan sama ada dia menerima pampasan itu tanpa bantahan atau sebaliknya. Borang H hanya dipinda kemudiannya dan digantikan dengan Borang H baru yang mula berkuat kuasa pada 1 Mac 1998. Hanya dalam Borang H baru itu yang mana orang berkepentingan dikehendaki menyatakan sama ada atau tidak dia menerima pampasan tanpa bantahan. Walau bagaimanapun, Borang H dalam kes ini telah dikeluarkan pada 30 Julai 1997. Dalam apa jua keadaan, perayu-perayu menegaskan bahawa mereka tidak menandatangani Borang-Borang H itu dan pendirian mereka kekal tidak dipatahkan kerana responden pertama tidak memfailkan apa-apa afidavit untuk menyatakan yang bertentangan (lihat perenggan 35–37).

(5) (oleh **Suriyadi HMR**) Keputusan responden pertama yang seterusnya untuk menambahkan jumlah pampasan sebanyak RM5,000 seekar adalah keterangan prima facie terhadap rasa tidak puas hati yang membawa kepada kausa tindakan yang munasabah. Oleh itu ia tidak patut dibatalkan (lihat perenggan 18).]

Notes

For cases on award for acquisition of land, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1797–1840.

For cases on striking out an action and land reference, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6655–6693.

Cases referred to

Abu Bakar bin Haji Yusof v Mohan Hamzah bin Hanapiah & Anor [1978] 2 MLJ 78, HC (refd)

Badiaddin bin Mohd Mahidin v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

Harkness v Bell's Asbestos and Engineering Ltd [1967] 2 QB 729, CA (refd)

Pertamina v Kartika Ratna Tahir & Ors [1983] 1 MLJ 136, HC (refd) A
Siaw Kim Seong v Siew Swee Yin (F) & Anor [2009] 1 MLJ 349; [2008] 5 AMR 97, CA (folld)

Legislation referred to

Rules of the High Court 1980 O 18 r 19, O 92 r 4 B
Land Acquisition Act 1960 ss 16, 30(b), 36, 37, 37(1), 38, 38(1), (4), (5), 39, 45, 51, Forms H, N, Part V

Noor Hamiza Ab Hamid (Abdul Razak Muhidin & Associates) for the appellant.
Ishak Sahari (State Legal Adviser, Negeri Sembilan) for the first respondent.
Sean HM Yeow (R Himahlini with him) (Lee Hishammuddin & Gledhill) for the second respondent. C

Suriyadi JCA:

D

[1] The appeal was allowed with costs by this panel and accordingly had set aside the order of the judge. I will now attempt to explain how this appeal came about. The matter began with the applicants ('the appellants'), being the registered owners of Lot 876 Hakmilik G 21012, Mukim Labu and Mukim Setul, District of Seremban ('the land'), having filed a land E acquisition reference at the High Court on 19 February 2003. The Pentadbir Tanah Daerah Seremban ('the first respondent') had acquired the land in 1993. For easy reference the singular refers to the plural and vice versa.

[2] The second respondent is the intervener. Its right to intervene came F about on the premise that it was the responsible party who paid the award for the acquired land and also to pay for any additional award, in the event additional payments were required. Armed subsequently with a court acquired right to intervene the second respondent on 29 March 2006 filed a summons in chambers ('the SIC') for an order that the land reference G proceedings be dismissed or struck out.

[3] The SIC reads as follows:

> Benarkan semua pihak yang berkenaan hadir di hadapan Hakim … mendengarkan H permohonan di pihak responden kedua yang dinamakan di atas menurut A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 dan/atau bidang kuasa sedia ada mahkamah yang mulia ini untuk perintah-perintah berikut:
>
> (1) prosiding rujukan tanah di sini hendaklah ditolak atau dibatalkan;
>
> I
>
> (2) kos permohonan ini dan prosiding rujukan tanah di sini di bayar oleh pemohon-pemohon kepada responden kedua; dan
>
> (3) relief selanjutnya atau selainnya yang difikirkan wajar dan sesuai oleh mahkamah yang mulia ini …

A **[4]** It was obvious that the second respondent wanted the land reference dismissed or struck out on the basis that the court had the inherent jurisdiction to do so. The learned judge gave 'order in terms'.

B **[5]** The locus or right to apply to court to challenge the award is governed by s 37 of the Land Acquisition Act 1960 (Act 486) ('the Act'), whereby only a person who either has not accepted the award or has accepted under protest, is entitled to apply to court to challenge the award. Further, pursuant to s 30(b) of the Act, any person who has received payment of the award other than under protest, shall not be entitled to require his claim be referred to the C court under the above section. Section 30(b) is a mandatory provision, as once a person has received an award without protest he is estopped from protesting later, based on the doctrine of election. It was the contention of the second respondent that the appellants in 1994 had accepted part of the award without any protest. With that acceptance, the challenge as against the award D was extinguished and the appellant was statutorily barred from protesting further. According to the SIC the land reference proceedings is an abuse of the process of law now that the appellants have received the award without any protest.

E HISTORY OF THE CASE

[6] Sifting through the evidence it was obvious that the matter on appeal had a rather chequered history. Even at the outset there was dissatisfaction F with the land acquisition and the resultant effect was that legal advice was sought by the appellants. Messrs Adlan & Haji Suhaimi which initially represented the owners of the land had filed the objection on their behalf of the acquisition all the way back to 17 January 1995. Unfortunately the first respondent failed to process the objection on some ground or other. Vide G letter dated 3 December 2000 (RR 275) the first respondent had kindly agreed that the matter be proceeded with in court. By this date a new set of solicitors had taken over, and on 15 June 2001 the court enlarged the objection time, in order to permit the landowners to forward their written objection to the first respondent. On 12 July 2001 the new solicitors H submitted the relevant Form N for the appellants together with the deposits. This was not denied by the first respondent. The flow of communication between the appellants and the first respondent continued and were still animated and constant until the hearing of the SIC.

I **[7]** From the affidavit evidence, sometime on 6 September 2004 (RR 78) the parties came to a consensus that additional compensation of only RM5,000 per acre would be paid out to the respective appellants by the first respondent. By consent too the additional compensation would be effective from June 2001 (see also exh TNK 3 RR 255). By backdating it all the way

to 15 June 2001 (RR 255–260), the appellants would not lose out on the interest. Even though the appellants had duly accepted the offer, nevertheless the acceptance was still made under protest, followed by the filing of the statutory Form N. Regretfully that Form N was also not processed by the first respondent or the cheques of the deposit ever cashed even though filed within the stipulated time.

[8] High politics with their intricacies were not the forte of the appellants, and they had no knowledge of the existence of the second respondent, or the supposed payment of the award by them. As far as the appellants were concerned the award was made by the first respondent and the cheques were issued by it as well. This panel viewed the relevant cheque and saw that it was indeed paid by Menteri Besar Negeri Sembilan Corporation (cheque number 374591 dated 6 December 1994); certainly not by the second respondent. In fact a perusal by us of every official document filed in the appeal record bears no signature, name or connection to the second respondent.

[9] In reply to the second respondent's averments (RR 72), the appellants complained that they were never given the necessary Form H as required by s 16 of the Act, which shall include an extract of the land administrator's written award. This issue came about as the second respondent, in its attempt to establish the acceptance of the compensation as being without protest, had annexed the receipt of acceptance (RR 115–239) and the impugned Form H. Taking one set as an example we take pages RR 115–120 documents signed by one Thong Sek for clarification. For starters a cursory glance by us of R1 ie the Form H, show that it was left unsigned (and this was the pattern with practically all the other Form H). By so not signing, it must be interpreted that the appellants never received these documents, or if they did, the award was rejected hence sufficiently informing the land office of their objection. With that backdrop the requirement of filing Form N had become superfluous. The question mark did not end there. The gross sum supposedly received by Thong Sek, as reflected by the receipts, was RM1,708,226.09 but yet his Form H reads that he only received RM1,063,935. Surely there is something not right here. Whichever way it may be interpreted, due to the favourable interpretation tilting in favour of the appellants, a triable issue had arisen.

[10] The appellants had ventilated that the SIC would prejudice their rights, as it would delay the process of the land reference further, let alone it now had gone past the tenth year. It was not denied that the court had already fixed a hearing date to deal with the award. If not for the SIC filed by the second respondent there would never have been any objection submitted by anyone as against the land reference. In fact even the first respondent was very sympathetic to the appellants' predicament (RR 275). In the event the court

was to increase the compensation award, it would not prejudice the second respondent, because there already was a consensual agreement involving the land acquisition, with the compensation to be paid by the first respondent. Then again there is absolutely no cogent evidence adduced anywhere that the second respondent has anything to gain or lose from this land acquisition. Any assumption of responsibility of the payment as ventilated by the second respondent, or its nexus to the land reference, was never corroborated by the first respondent, be it by oral or affidavit evidence. The appellants on the other hand have much to lose either by any delay or the striking out action.

ADDITIONAL REASONS FOR ALLOWING THE APPEAL

[11] The SIC had prayed for the land reference be dismissed or struck out. Come the decision day the court had merely stated 'order in terms'. It was not clarified whether the land reference was dismissed or struck out. Any practitioner will be aware that these two orders are worlds apart, with special provisions to deal with them in the event of any dissatisfaction. Generally speaking, in the event of any dissatisfaction, the procedure to be adhered to pursuant to a dismissal order is to file an appeal whilst in a striking out order, a reinstatement application. That confusion in itself was sufficient ground to allow the appeal or set aside the order.

[12] If the order was a dismissal of the land reference, it would mean that the proceedings was adjudged not in accordance with the special provisions and demands of the Act but pursuant to the Rules of the High Court 1980. Land reference proceedings are triggered by s 37, which gives an aggrieved party the right to make an objection, and s 38 the manner of making the objection. These two provisions fall under Part V which spans from ss 36–51 of the Act. Section 45, a mandatory provision, promulgates that every land reference proceeding under this part ie of Part V shall take place in open court. As the name denotes, a summons in chambers procedurally is certainly not heard in open court, and it is undeniable that the SIC under discussion was heard in chambers. The perfected order of 13 March 2008 confirms that (supplementary appeal record p 2). In a nutshell, the order of the learned judge was meted down in chambers, and not in open court as statutorily required. Regardless of whether it was a dismissal or a striking out order, it was tainted thus sufficient ground again to set it aside.

[13] Taking a step further, if it was not a dismissal order, then it must be a striking out order. Was it so obvious that the matter was unsustainable?

[14] I start off with some procedural matter ie the issue of locus standi of the intervener. Regretfully we found no order attached in the appeal records

permitting the second respondent to intervene in the land reference matter. Even if the latter were permitted to intervene, the order handed down was not by a High Court judge, but by a senior assistant registrar and given in chambers. Again it contravened s 45 of the Act. Even though the appellants did not appeal against that order they did ventilate that they reserve the right to apply for a setting aside of that order. With cases in the like of *Badiaddin bin Mohd Mahidin v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 which endorses that 'where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside' the chances of success are high (*Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729).

[15] How the second respondent got into the affray, and empowered with rights of intervention, when the facts militate against such empowerment, again makes the locus standi order shaky. As stated in the preceding paragraphs the first respondent has at no time corroborated or supported the assertion of the second respondent. According to the second respondent, the source of the compensation payment was it, but yet the cheque made out to the appellants was issued by the government. With such a doubtful order handed down by the senior assistant registrar the SIC would have no leg to stand on.

[16] As regards the facts, there was prima facie evidence supplied by the appellants that they had sufficiently informed the land office of their objection of the award. For starters the non-signing of practically all the forms of Form H, which were supplied by the second respondent, was dramatic notification of their protests. Even if this interpretation were not accepted, the appellants had filed the necessary Form N as a backup course of action. This filing was made all the way back on 17 January 1995 and acknowledged by the land office though never processed by the latter. The appellants should not be made to suffer for the negligence or indolence of the land office. To say that the appellants never objected to the sum offered to them thus was an erroneous factual finding in light of the above clarification. This submission of the second respondent of want of protest by the appellants also flew in the face of the letters of the state legal adviser as annaxed at pp 271 and 275. This by itself was a triable issue.

[17] Despite the matter under appeal being a land reference matter, the second respondent had made the application in the SIC pursuant to O 92 r 4 of the Rules of the High Court 1980, which is a High Court judge inherent powers' empowerment provision. No reference was made to any provision in the Act, or the Rules of the High Court 1980, in the like of O 18 r 19 intituled in the SIC, in support of the application. Inspite of the glaring

procedural weaknesses on the face of the documentation the draconian remedy was still adverted to (*Janab's Key to Civil Procedure in Malaysia and Singapore*).

[18] To wind up the matter as regards the existence of a cause of action, no minute and protracted examination of the documents and facts will be required, as it is too obvious for comfort. The fact that the compensation sum was increased by RM5000 per acre by the first respondent subsequently is prima facie evidence of the existence of some dissatisfaction, leading to a reasonable cause of action. To add to it, even if the likelihood of success is uncertain, so long as the land reference discloses some ground of action, it should not be struck out (*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7; *Abu Bakar bin Haji Yusof v Mohan Hamzah bin Hanapiah & Anor* [1978] 2 MLJ 78; *Pertamina v Kartika Ratna Tahir & Ors* [1983] 1 MLJ 136). With the abundant triable issues before the court, it could not be said that the land reference was obviously unsustainable.

[19] On the grounds supplied above, we had no hesitation in allowing this appeal with costs, set aside the order of the High Court, have the deposit refunded, and order the land reference reinstated.

Abu Samah JCA:

[20] The appellants are the registered owners of part of an undivided piece of land measuring 668.295 acres held under Lot No 876 Hakmilik G21012 Mukim Labu District of Seremban. The land had been acquired by the first respondent under the Land Acquisition Act 1960 ('the Act') for a public purpose. Being dissatisfied with the amount of compensation awarded by the first respondent, they lodged their objection under s 38(1) of the Act by filing the requisite Form N, requiring the first respondent to refer the matter for the determination of the court.

[21] It was received by the first respondent on 27 January 1995. By s 38(5) of the Act the first respondent must within three months of receipt of the objection, subject to s 39, refer the matter to the court by way of reference in Form O. Unfortunately, due to the first respondent's inaction and oversight the objection was left unattended and never processed. It was only after enquiries by some of the appellants that the first respondent by a letter dated 5 December 2000 wrote to the registered owners informing them that they could still proceed with their objection by filing the necessary documents. By then, the appellants were already out of time if they had to refile their objection. Under such circumstances, they turned to the court to apply for an extension of time under s 38(4) of the Act.

[22] On 15 June 2001 they obtained a consent order from the High Court for an extension of time to file their objection within 30 days of the said order. The first respondent quite understandably did not object to the said application.

[23] On 12 July 2001 the appellants' solicitors Messrs Abd Razak Muhidin & Associates submitted nine fresh copies of Form N together with the payments of deposit as required by s 39 of the Act. This was duly acknowledged by the first respondent on 13 July 2001, by stamping its rubber stamp on a copy of the covering letter from the appellants' solicitors to the first respondent (exh TNK 10).

[24] The first respondent acted accordingly and referred the objection to the court for its determination, vide Land Reference No 15–2 of 2003.

[25] The second respondent then successfully applied by way of a summons in chambers to intervene in the land reference as an interested party. On 29 March 2006, it applied by another summons in chambers to dismiss or strike out the land reference and that the costs of the application and the land reference be paid by the appellants. The application was made under O 92 r 4 of the Rules of the High Court 1980 ('RHC') on the grounds that:

(a) the land reference is an abuse of the process of court;

(b) the appellants had accepted the compensation as awarded by the first respondent without protest; and

(c) the appellants were not entitled under s 30(b) of the Act to make the reference to the court.

[26] The affidavits in support of the second respondent's application was affirmed by its director, one Dato' Gan Kong Hiok. In essence, he restated the grounds of the application as stated in the summons in chambers. In addition, he also referred to his affidavit in support of the second respondent's application to intervene. In the said affidavit he deposed that the acquired land was alienated to the second respondent for the purpose of the development of a new township, namely, Bandar Baru Nilai, Negeri Sembilan. Hence it was the party which was responsible for the payment of compensation including any additional compensation which may be given by the court to the appellants. It had in fact paid the amount of compensation as awarded by the first respondent and contended that the appellants had received their compensation without protest. Any further increase in the amount of compensation by the court would therefore be prejudicial to its interest as it was the party responsible to meet any increase in the said compensation.

A **[27]** The second respondent relied on Form H issued by the first respondent to the appellants and the receipts of acknowledgment by the appellants of the award of compensation as evidence that the appellants accepted the said compensation without protest. Section 37(1) of the Act only allows any interested person to make objection on the amount of
B compensation if he had accepted it under protest. Any interested person who accepted the award without protest is precluded from objecting to the said amount of compensation.

C **[28]** In their affidavits in reply the appellants denied any knowledge that the second respondent was responsible for the payment of compensation. They pointed out that the payments were made by the first respondent by cheques issued by the state's corporate arm, namely, the Menteri Besar Negeri Sembilan (incorporation). They asserted that they accepted the compensation
D under protest and that they signed the letters of acknowledgment merely as evidence of such acceptance and it should not be construed as taking away their right to refer their objection to the court or that they were satisfied with the amount of compensation. Indeed the first respondent had by consent order dated 15 June 2001 agreed to their application for an extension of time
E to file their objection for reference to the court although such application would not have been necessary had the first respondent being vigilant and processed their earlier objection promptly. The second respondent did not produce any documentary evidence that it had in fact made the payments through the first respondent for purposes of the acquisition, apart from its
F bare assertion in its affidavits.

[29] The appellants further contended that they had never received the said Form H from the first respondent nor did they signed them. It is not denied that even some of the Forms H exhibited by the second respondent were not
G even signed by the first respondent.

[30] The first respondent did not file any affidavit to show that Form H had been duly served on the appellants. That being the case the second respondent's assertion that the appellants had accepted the compensation
H without protest remained unsubstantiated.

[31] The learned judge did not make any specific ruling or finding of fact on whether or not the appellants accepted the compensation with or without protest. It appeared that he disregarded the second respondent's contention
I that the appellants had accepted the compensation without protest in view of the extension of time granted by the court. There was ample evidence before the court to support the appellants' contention that they accepted the compensation under protest. The appellants' previous solicitors' letter dated 17 January 1995 enclosing nine copies of Form N was duly acknowledged by

the first respondent on 27 January 1995. In its letter dated 30 October 2000 the first respondent admitted that the appellants did in fact file their objection through their previous solicitors (see exh TNK 8). In view of such evidence the appellants were not barred by s 37(1) of the Act from filing their objection to the amount of compensation. It was the first respondent who did not process their earlier objection and referred the matter to the court as required by s 38(5) of the Act.

[32] The learned judge allowed the second respondent's application and dismissed or struck off the land reference on the sole ground that there was no evidence that the appellants had filed their objection in Form N within the 30 days period as allowed by the court, that is by or before 15 July 2001.

[33] This is what the court said:

> Berikutan dari perintah tersebut, maka satu-satunya isu yang perlu diputuskan di dalam permohonan semasa ialah sama ada Borang N telah diserahkan kepada Pentadbir Tanah Daerah Seremban oleh pemohon-pemohon atau peguam mereka dalam tempoh 30 hari dari tarikh perintah berkenaan.

The court held that Form N was not filed within time and accordingly granted the second respondent's application to dismiss or strike out the land reference by the appellants.

[34] The appeal by the appellants is against the said decision. Upon a close scrutiny of the appeal record, it is abundantly clear that the conclusion by the court at the appellants' objection in Form N was filed out of time was erroneous and against the weight of evidence. The covering letter from the appellants' solicitors dated 12 July 2001 enclosing fresh copies of Form N together with the requisite deposit as required by s 39 of the Act was duly received and acknowledged by the first respondent on 13 July 2001 (exh TNK 10). That was well within the 30 day period granted by the court. This is an obvious case where the appellate court is justified to interfere and rectify the error. In *Siaw Kim Seong v Siew Swee Yin (F) & Anor* [2009] 1 MLJ 349; [2008] 5 AMR 97 the Court of Appeal, at p 353 (MLJ); p 102 (AMR) said:

> In an ordinary case involving findings of fact, we do, as a general rule defer to the opinion formed by the judge who is audio visually advantaged. But where the primary trier of fact has failed to judicially appreciate the evidence before him, this court will — indeed it is duty bound to — interfere and correct the error. In this behalf we need do no more than to quote from what we said in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 AMR 357; [2003] 2 CLJ 19 which was approved by the Federal Court when it went to them on second appeal:

A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

On this ground alone the appeal ought to be allowed.

[35] The second respondent's contention that the appellants accepted the compensation without protest by relying upon Form H and thereby precluded from filing the objection on the amount of compensation by s 37(1) of the Act is misconceived and untenable. Form H, as it then was, did not contain any stipulation that an interested person must state whether he accepted the compensation under protest or otherwise. He was only required to sign the form as an acknowledgment that he had received the compensation or that he did not accept the offer of compensation by the land administrator.

[36] Form H in this case was issued on 30 July 1994. It was subsequently amended and replaced by a new Form H by the Land Acquisition (Amendment) Act 1997 (Act A999) which came into force on 1 March 1998. It is only in the new Form H that any interested person is required to state whether or not he accepts the offer of compensation under protest.

[37] In any event, none of the appellants had signed the said Form H and their contention that they were never served with the said form remained unrebutted as the first respondent did not file any affidavit to state to the contrary.

[38] I have had the privilege of reading the judgement in draft of by learned brother Suriyadi Halim Omar and I am in agreement with him that the second respondent's application to dismiss or strike out the land reference by way of a summon in chambers was not made in accordance with the mandatory provision of s 45 of the Act, which requires that every proceeding under Part V shall take place in open court. It is manifestly clear from the order of the court that the proceeding in the High Court took place in chambers and not in open court.

[39] For the aforesaid reasons, I agree with my learned brother that the appeal by the appellants be allowed with costs, the order of the High Court be set aside, the land reference be reinstated and that the deposit be refunded to the appellants.

Appeal allowed with costs.

Reported by Kohila Nesan